LEGISLATION

Cigarette Tax

P.L. 1999, C. 328 — Sales of Reimported Cigarettes
(Signed into law on January 6, 2000) Forbids the stamping and sale of reimported cigarettes originally produced for export.

Under the legislation, distributors cannot stamp packages that:

- Do not comply with the Federal Cigarette Labeling and Advertising Act.
- Are labeled "For Export Only," "U.S. Tax Exempt," "For Use Outside U.S.," or other wording indicating that the manufacturer did not intend that the product be sold in the United States.
- Have been altered adding or deleting words, labels or warnings described above.
- Were imported into the United States after January 1, 2000.
- Violate Federal trademark or copyright laws.

The law also makes it illegal to possess and/or sell cigarettes that fall into any of the above categories, and such cigarettes are subject to confiscation. This legislation became effective upon enactment.

Constitutional Amendment

Veterans' Property Tax Deduction
On November 2, 1999 the electorate approved an amendment to Article VIII, Section I, paragraph 3 of the New Jersey Constitution increasing the property tax deduction for veterans from the current $50 level to $100 in tax year 2000, $150 in tax year 2001, $200 in tax year 2002 and $250 in each subsequent tax year.

Dedication of Tax Revenues
Senate Concurrent Resolution No. 1 (filed with the Secretary of State on June 30, 2000) proposes a Constitutional amendment providing for the dedication of revenues from the Petroleum Products Gross Receipts Tax, and certain amounts from sales tax on revenues from the sale of new motor vehicles, for transportation purposes. The proposed amendment to the Constitution was on the ballot for the general election on November 7, 2000.

Corporation Business Tax

P.L. 1999, C. 369 — Certain Hedge Fund Income of Alien Corporations Excluded
(Signed into law on January 14, 2000) Excludes certain investment income generated in New Jersey by corporations from foreign nations involved in investing and trading for their own accounts. If a corporation has some activities that go beyond trading for its own accounts, the trading income may remain exempt in some cases. This act applies to privilege periods ending on or after July 1, 2000.

P.L. 2000, C. 12 — Insolvent HMO Assistance
(Signed into law on April 6, 2000) Establishes the "New Jersey Insolvent Health Maintenance Organization Assistance Fund Act of 2000" which provides for payment of certain individual and provider claims against HIP Health Plan of New Jersey, Inc. and American Preferred Provider Plan, Inc.

The law also provides that a member organization may offset against its corporation business tax liability an amount of not more than 10% of any assessment for each of the five privilege periods beginning on or after the third calendar year commencing after the assessment was paid, except that no member organization may offset more than 20% of its corporation business tax liability in any one year. This legislation became effective upon enactment and applies only to the insolvency of HIP Health Plan of New Jersey, Inc. and American Preferred Provider Plan, Inc.

Gross Income Tax

P.L. 1999, C. 177 — Pension Exclusion, Other Retirement Income Exclusion Increased
(Signed into law on August 3, 1999) Increases the maximum amount of certain retirement income that may be excluded from taxable income under the New Jersey Gross Income Tax Act as follows:

- For taxpayers filing joint returns: from $10,000 to $20,000
- For married, filing separate filers: from $5,000 to $10,000
- For single, head of household or qualifying widow(er) filers: from $7,500 to $15,000

Taxpayers eligible for the pension exclusion can exclude from reportable income either their actual pension income or the maximum exclusion amount for their filing status, whichever is less.

The higher exclusion limits extend as well to the Other Retirement Income Exclusion, the exclusion which allows taxpayers age 62 or older with earned income of $3,000 or less to deduct the unused portion (if any) of their pension exclusion from their reportable gross income. The total amount of pension income plus other retirement income that may be excluded cannot exceed the new exclusion limits.

The new limits are to be phased in, in equal increments, over a four-year period commencing with taxable years beginning on or after January 1, 2000.

P.L. 1999, C. 222 — Health Insurance Costs for Self-employed Taxpayers
(Signed into law on September 22, 1999) Amends the Gross Income Tax Act to allow the self-employed and those who are more than 2% shareholders in an S corporation to deduct 100% of the cost of health insurance for themselves, their spouses and their dependents. The act took effect immediately and applies to tax years beginning on or after January 1, 2000.

P.L. 1999, C. 260 — Higher Tax Filing Thresholds
(Signed into law on October 18, 1999) Increases the minimum income level at which taxpayers become subject to the New Jersey gross income tax and are obligated to file a New Jersey gross income tax return. The income filing threshold increased to $10,000 ($5,000 for married persons filing separately) for the 1999 tax year. For tax year 2000 the threshold increased to $15,000 for married persons filing jointly, heads of households and surviving spouses, and to $7,500 for married persons filing separately. For tax year 2001 and later, the threshold will be $20,000 ($10,000 for married persons filing separately, single filers and estates and trusts).

P.L. 1999, C. 355 — Checkoff for Vietnam Veterans' Memorial Fund
(Signed into law on January 14, 2000) Makes the Vietnam Veterans' Memorial Fund checkoff on the gross income tax return permanent. This act applies to tax years beginning on or after January 1, 2000.

P.L. 1999, C. 372 — Qualified Conservation Contribution
(Signed into law on January 14, 2000) Provides a gross income tax deduction for qualified contributions of certain interests in real property located in this State for conservation purposes as defined under the Federal IRC section 170(h). The amount of the deduction will be equal to the amount allowed as a deduction for Federal income tax purposes. This act applies to tax years beginning on or after January 1, 2000.

P.L. 1999, C. 386 — Checkoff for Organ and Tissue Donor Awareness Education Fund
(Signed into law on January 14, 2000) Allows taxpayers to make voluntary contributions on their gross income tax returns for organ donor education programs. This act applies to tax years beginning on or after January 1, 2001.

Local Property Tax

P.L. 1999, C. 216 — Revaluation Relief Act of 1999
(Signed into law on September 21, 1999) Amends the Revaluation Relief Act of 1993 by adding a provision permitting municipalities the option to grant revaluation relief abatements to eligible properties through the use of a property tax rebate mechanism rather than through the current property tax credit mechanism. In addition, the bill allows the revaluation relief to be phased in over five years rather than the three years allowed under current law. The act took effect immediately and affects real property revaluation in the City of Newark.

P.L. 1999, C. 259 — Homestead Rebates
(Signed into law on October 15, 1999) Modifies one provision of the New Jersey School Assessment Valuation Exemption Relief and Homestead Property Tax Rebate Act (NJ SAVER and Homestead Rebate Act) P.L. 1999, c. 63. The technical change incorporated in this bill ensures that benefits provided to a tenant who is 65 years of age or older, or who is eligible to claim a deduction as a blind or disabled taxpayer, shall not be less than the minimum benefit provided to other eligible tenants (i.e., $40 for tax year 1999; $60 for tax year 2000; $80 for tax year 2001; and $100 for tax years 2002 and thereafter). The act took effect immediately.

P.L. 1999, C. 278 — Continuing Education Program for Tax Assessors
(Signed into law on December 8, 1999) Requires tax assessors to complete a specified number of continuing education credits for renewal of tax assessor certificates and establishes the Tax Assessor Continuing Education Eligibility Board to set curriculum requirements.

To renew a certificate, applicants must pay the required fee of at least $50 and provide verification that the continuing education requirements were met. The requirement for the first renewal is 50 continuing education credit hours during the preceding 5-year period. The requirement for subsequent renewals is 30 continuing education credit hours during the preceding 3-year period. This act took effect on July 1, 2000.

P.L. 1999, C. 284 — Recreational Vehicles
(Signed into law on December 20, 1999) Provides that a recreational vehicle installed in a campsite is not subject to tax as real property.

The legislation defines a recreational vehicle as a unit consisting of one or more transportable sections primarily constructed off-site, built on a permanent chassis, and designed to be used as a temporary dwelling. The unit is on a nonpermanent foundation and is not used as a dwelling on a permanent basis. This legislation became effective upon enactment.

P.L. 1999, C. 357 — Realty Transfer Fee
(Signed into law on January 14, 2000) Clarifies that the conversion from a cooperative to a condominium is not subject to the realty transfer fee. This legislation became effective upon enactment.

P.L. 2000, C. 9 — Annual Property Tax Deduction Increase
(Signed into law on March 30, 2000) Implements the State constitutional amendment approved by New Jersey voters on November 2, 1999, that increases the annual property tax deduction from $50 to $250 for certain veterans and their unmarried surviving spouses.

The new deduction amounts, which are being phased in over four years, increase to $100 in calendar year 2000, $150 in calendar year 2001, $200 in calendar year 2002, and $250 in calendar year 2003 and thereafter. This legislation became effective upon enactment.

Miscellaneous

P.L. 1999, C. 208 — Tax Court Proceedings
(Signed into law on September 17, 1999) Implements a series of recommendations promulgated by the Supreme Court's Committee on the Tax Court and adopts amendments dealing with county tax board appeals and certain Tax Court proceedings. The act took effect immediately. However, certain provisions apply to tax assessments for years commencing on or after January 1, 2000.

P.L. 1999, C. 375 — Authorization to Impose Municipal Taxes Extended
(Signed into law on January 14, 2000) Extends the municipal payroll and parking tax authorization for Jersey City, Elizabeth and Hudson County municipalities to December 31, 2004. The authorization for Newark was extended to September 30, 2000 and can be extended further under the terms of P.L. 1999, c. 216.

The law also clarifies that instrumentalities of the State, such as New Jersey Transit Corporation, are not exempt from local parking taxes. This legislation became effective upon enactment.

Petroleum Products Gross Receipts Tax

P.L. 2000, C. 48 — Rate Set at Statutory Minimum
(Signed into law on June 30, 2000) Sets the Petroleum Products Gross Receipts Tax rate on fuel oils, motor fuels and aviation fuel at the current 4 cents per gallon rate, the minimum statutory rate allowed. This prevents a possible administrative determination to increase the cents-per-gallon rate triggered by higher Statewide average gasoline prices. This law took effect immediately.

Sales and Use Tax

P.L. 1999, C. 221 — Expanded Exemption for Film and Video Industry
(Signed into law on September 22, 1999) Expands the sales and use tax exemption for the film and video industry to include purchases of tangible personal property for use directly and primarily in the production of film or video for sale, including parts, motor vehicles, tools and supplies. The act also exempts the services of installing, maintaining, servicing or repairing tangible personal property that is entitled to the exemption. The act took effect December 1, 1999 and applies to property sold and services rendered after that date.

P.L. 1999, C. 246 — Exemption for Certain Aircraft Repairs, Equipment
(Signed into law on October 15, 1999) Provides an exemption from New Jersey sales and use tax for repairs on aircraft having a maximum takeoff weight of 6,000 pounds or more, as certified by the FAA. The exemption also applies to machinery or equipment to be installed on such aircraft and to replacement parts therefor. However, the exemption

does not apply to the *sale* of aircraft of this class. The act took effect January 1, 2000.

P.L. 1999, C. 248 — Prepaid Telephone Calling Arrangements
(Signed into law on October 15, 1999) Clarifies the imposition of New Jersey sales and use tax on the retail sale of prepaid telephone calling arrangements ("calling cards"). The statute shifts the incidence of the tax from the point of use to the point at which the arrangement is sold to the consumer. Requiring vendors to charge tax on the retail selling price simplifies the tax collection and payment process. The act took effect January 1, 2000.

P.L. 1999, C. 249 — Exemption for Certain Vending Machine Sales
(Signed into law on October 15, 1999) Increases the allowable exemption from sales and use tax from $0.10 to $0.25 on sales of tangible personal property made through coin-operated vending machines. The exemption applies to sales of merchandise other than food and drink products. The act took effect immediately.

P.L. 1999, C. 253 — Firearm Accident Prevention Act
(Signed into law on October 15, 1999) Provides an exemption from New Jersey sales and use tax for sales of firearm trigger locks and other devices which enable a firearm to be made inoperable by anyone other than an authorized person. The act took effect December 1, 1999.

P.L. 1999, C. 254 — Secure Firearm Storage Act
(Signed into law on October 15, 1999) Provides an exemption from New Jersey sales and use tax for sales of vaults that provide safe and secure storage for firearms. The act took effect December 1, 1999.

P.L. 1999, C. 273 — Commuter Ferryboat Exemption
(Signed into law on November 24, 1999) Provides for an exemption from sales tax on the sales, repairs, alterations or conversion of ferryboats that are used primarily to transport passengers during peak commuting hours. This legislation became effective upon enactment.

P.L. 1999, C. 314 — Farmer's Exemption
(Signed into law on January 6, 2000) Expands the sales tax exemption for certain purchases made for farm use. The law provides that the sales tax exemption for wrapping supplies will now include containers for use in a "farming enterprise."

The farm use exemption is expanded to include the sale to a farmer of production and conservation services, in addition to the sale of tangible personal property. These sales must be directly and primarily used in the production, handling and preservation for sale of an agricultural or horticultural commodity at the farming enterprise of the farmer. The exemption does not apply to sales of automobiles, energy or materials used to construct a building or structure other than a silo, greenhouse, grain bin, or manure handling equipment. This act applies to sales made on or after January 1, 2000.

P.L. 1999, C. 365 — Exemptions for Hurricane Floyd Victims
(Signed into law on January 14, 2000) Provides an exemption from sales tax paid by victims of Hurricane Floyd to replace motor vehicles, household goods, home repair materials, heating and cooling systems and appliances, as well as services to install, replace or repair property that was damaged or lost in flooding attributable to Hurricane Floyd in counties federally designated as disaster areas.

Documentation of the flood loss and proof of sales tax paid must accompany any claim for a refund. This legislation became effective upon enactment and applies retroactively to purchases made during the recovery period, September 17, 1999, through September 30, 2000. Refunds must be requested on or before March 31, 2001.

P.L. 1999, C. 416 — Exempt Organization Status
(Signed into law on January 18, 2000) Grants exempt organization status under the Sales and Use Tax Act to a National Guard organization, the Marine Corps League, war veterans' posts or associations, and the auxiliary units of these organizations.

The law clarifies an existing requirement that the exemption from sales tax of a sale to an exempt organization shall apply only if no part of the net earnings of the organization benefit any private shareholder or individual and the organization does not engage in lobbying or political campaign activity.

The law also creates a Sales and Use Tax Review Commission to review any bills that would expand or reduce the base of the sales and use tax. This legislation took effect March 1, 2000.

Spill Compensation and Control Tax

P.L. 1999, C. 342 — Extension of Cap Benefit
(Signed into law on January 10, 2000) Provides an extension of the cap benefit under the Spill Compensation and Control Tax.

This law amends the Spill Compensation and Control Act to allow a Spill tax capped corporation's successor in interest pursuant to an IRC §368(a)(1)(D) reorganization on or before October 1, 1997 to be eligible for such cap, which is an annual tax limit of no more than 125% of the tax liability in the 1986 base year of the predecessor corporation. It would also allow the successor corporation a refund of any Spill taxes paid in excess of the capped limitation since January 1, 1996.

The law also clarifies that for a capped corporation or its qualified successor in interest, the taxes not included in the 1986 base would only be for those major facilities that prior to January 1, 1996, were entirely closed and decommissioned. This legislation became effective upon enactment.

Transfer Inheritance Tax

P.L. 2000, C. 29 — Executor Commissions
(Signed into law on June 16, 2000) Amends N.J.S.A. 3B:18-14 to clarify the calculation of the commissions to which executors of estates are entitled for Transfer Inheritance Tax purposes. This legislation became effective upon enactment.

COURT DECISIONS

Administration

Subject Matter Jurisdiction
James Construction Company, Inc., v. Director, Division of Taxation and Commissioner, Department of Labor, decided June 22, 1999; Tax Court; No. 005268-98. The Court ruled that the Tax Court does not have jurisdiction to hear unemployment compensation contribution cases. The Court found that neither the statutes, regulations, nor the Tax Court jurisdiction statutes grant judicial review by the Tax Court.

Subject Matter Jurisdiction
Delta Data Net, Inc., v. Director, Division of Taxation, decided July 23, 1999; Tax Court; No. 00661-1999. The Division sent the notice of assessment related to final audit determination for sales and use tax and corporate business tax (hereinafter "notice") dated September 3, 1998, by certified mail and addressed to plaintiff's address on September 2, 1998. The certified mail receipt indicates that plaintiff received the notice on September 4, 1998, as evidenced by the signature of plaintiff's employee. By letter dated January 15, 1999, plaintiff protested and requested a conference that was denied by the Division's February 5, 1999, letter for failure to file a protest within the 90-day period for the September 3, 1998, notice.

Pursuant to the Division's motion to dismiss the complaint, plaintiff claimed that the complaint should be heard because (1) the letter was dated September 3 and mailed on September 2 which indicates it is not the same letter, (2) the certified receipt number was not put on the September 3 letter and that casts doubt as to whether it is the same letter, (3) the letter was not addressed to someone like the company's CFO who had attended meetings with the Division concerning the audit at issue, (4) their June meeting with the Division was in the nature of a protest as they told the Division there were documents they needed to locate that would demonstrate that the tax was not owed, and (5) plaintiff is a zealous taxpayer that never would have ignored the notice.

The Court dismissed plaintiff's complaint due to lack of subject matter jurisdiction. The Court found that the September 3, 1998, notice of assessment was properly addressed, sent by certified mail to plaintiff, and received by plaintiff's employee. N.J.S.A. 54:49-19 provides that challenges to the notice of assessment must be filed within 90 days of the date of the notice. Therefore, the Court ruled that plaintiff did not timely file its protest with the Division because plaintiff did not file a written protest within this 90-day period. Furthermore, the Court stated that:

> "It is not the problem of the director, and again, even putting the strongest responsibility on the director to turn square corners, it is not the problem or obligation of the director to hand deliver that letter, to have knocked on the door and said, Mr. Devito, here we are with something, it's really important and you need to look at it."

Subject Matter Jurisdiction
Dundee Automotive, Inc., v. Director, Division of Taxation, decided July 30, 1999; Tax Court; No. 002143-99. Plaintiff's complaint was timely received by the Tax Court Management Office (hereinafter "office") on the 89th day after the date of the Division's Final Determination; however, the filing fee was not included. The office stamped the complaint "Received but not Filed" and permitted plaintiff ten days to remit the filing fee in order for the complaint to be considered filed timely. On the 17th day, the office received plaintiff's filing fee.

The Court granted the Division's motion to dismiss the complaint. The Court held that it lacked jurisdiction to hear the case because plaintiff failed to perfect his appeal with the Tax Court within 90 days of the date of the Final Determination.

Bankruptcy Choateness
In the Matter of Johns, Klear, and the State of New Jersey v. the USA, decided October 7, 1999; District Court; No. 99-2521 and 99-1880. The District Court reversed, in part, the Bankruptcy Court's determination of when the State's lien arising under the New Jersey Gross Income Tax Act became choate.

The District Court ruled that a State lien becomes established and enforceable on the assessment date (Citing *Monica Fuel Inc*., 56 F.3d 508, 512 (3rd Cir. 1995)).

Under the New Jersey Gross Income Tax Act, the amount of tax that a return states is due is deemed assessed on the filing date (See N.J.S.A. 54:9-3(a)). Therefore, the Court held that the liens to the extent of the tax shown on the return were choate on the date plaintiffs filed their returns.

On the other hand, the Court ruled that penalty and interest were not deemed assessed on the filing date because taxpayers did not include penalty and interest on their returns. The Court reasoned that the assessment of penalty and interest under the Gross Income Tax Act must be made through the deficiency assessment process, which process was not performed in either of the aforementioned cases. Therefore the Court held that the liens for interest and penalties were inchoate, were not perfected.

Time Period to File Appeal with Tax Court
Alex M. Ponzi-Montalto v. Director, Division of Taxation, decided November 16, 1999; Tax Court; No. 005577-1998. In 1992, the Division sent plaintiff a "Notice and Demand for Payment of Tax" (hereinafter Notice) stating that plaintiff had ten days to show cause why the State should not file a Certificate of Debt against her in her capacity as a responsible officer of her corporation. The Notice also stated: "A personal visit to the Division of Taxation is not necessary to discuss this matter. However, if you desire a conference, you *must* call or write in advance to arrange an appointment." Fourteen days later, plaintiff's attorney corresponded with the Division concluding as follows: "Accordingly, I wish you would review the enclosed orders and contact me at your earliest convenience so that we may discuss this matter further. Thank you." Thereafter, the Division filed a Certificate of Debt (hereinafter COD) against plaintiff. In the same year, plaintiff twice communicated with the Division via telephone and was advised that she would be held responsible.

In 1994, the Division issued a Warrant of Execution to satisfy the indebtedness set forth in the 1992 COD. In December 1994, the Division issued a second COD to plaintiff in her capacity as a responsible person of the same corporation for an additional amount of assessed taxes against her corporation. Notification of the docketing of the 1994 COD was sent to plaintiff in 1995.

In 1997, plaintiff's attorney corresponded with the Department of Law and Public Safety requesting a conference to dispute plaintiff's status as a responsible officer. On May 20, 1998, a representative of New Jersey's Attorney General wrote plaintiff's attorney advising that the Division would not release the client from responsibility and that the only alternative was Tax Court. On September 9, 1998, plaintiff filed a valid complaint with the Tax Court alleging that she was not a responsible officer for certain time periods and that her May 20, 1998, letter constituted an act of the Director from which she could appeal. In its September 10, 1999, bench opinion, the Court rejected plaintiff's argument concerning the May 20, 1998, letter without reiterating the analysis and reasoning in this opinion.

In its inquiry, the Court focused on the adequacy and validity of the Division's notifications with respect to the determinations of liability stated in the two CODs. The Court ruled that the notifications were adequate as they were not assessments and complied with the statutes in effect at that time. The Court found that the plaintiff did not request a hearing or formally protest any Division notification until 1997 and that her failure to appeal for more than four years was unexcusable whereas here she received notification of the liability being imposed. Therefore, the Court granted the Division's motion to dismiss the complaint on grounds of untimely filing.

Division's Inherent Power of Recoupment
Playmate Toys, Inc., v. Director, Division of Taxation, decided December 21, 1999; New Jersey Supreme Court; No. A-70. The Division granted a refund claim to plaintiff on time periods that were barred by the statute of limitations. Thereafter, the Division issued a final determination directing plaintiff to return the erroneous refund.

In a unanimous decision, the New Jersey Supreme Court affirmed the Appellate Division's holding that although the Division has no statutory power to recoup mistaken disbursements, it does have an inherent power to do so. However, the Court added that this inherent power is not unlimited as the "powers of the Division are not boundless." The Court differentiated this case concerning the correction of a clerical error from a case concerning the correction of an error in judgment.

Adequate Notice
Leonard Santos v. Director, Division of Taxation, decided January 21, 2000; Tax Court No. 002138-1999. By letter dated January 10, 1995, the Division notified plaintiff's corporation that it intended to conduct an audit of plaintiff's business. The letter was addressed to the business at their P.O. Box in Trenton. After plaintiff alleged that there was a complete loss of its accounting records, the Division mailed an arbitrary assessment to the corporation at its North Broad Street, Trenton site address on December 5, 1995. The postal service could not deliver the letter and returned it to the Division. On December 8, 1995, the arbitrary assessment was mailed to the Trenton P.O. Box. This letter was also returned to the Division by the postal service with a "Box Closed" notation on the envelope.

On July 15, 1996, the Division sent a notice and demand for payment of tax to the corporation at the Trenton P.O. Box address. Plaintiff's wife signed the mailing receipt. This notice advised the corporation that it had 90 days to appeal the Division's determination of tax liability. The corporation neither protested the notice with the Division nor did it file a complaint with the Tax Court.

On July 15, 1996, the Division also sent a notice to plaintiff stating that he was personally liable for unpaid corporate taxes. This notice was sent to plaintiff's address at Monmouth Junction, New Jersey, but was returned by the postal service with a notation "Attempted, Not Known." Thereafter, the Division secured a Pennsylvania address for plaintiff through a credit-reporting agency. On October 3, 1996, the Division sent a notice to the PA address concerning plaintiff's personal liability for corporate taxes and stated that he had a right to an administrative hearing provided he complied with N.J.A.C. 18:1-1.8 by filing a proper protest. This mailing was signed as received by plaintiff's wife. On November 5, 1996, plaintiff's accountant filed a nonconforming N.J.A.C. 18:1-1.8 protest. The Division's Conference & Appeals Branch denied the protest as untimely and advised that an appeal to the New Jersey Tax Court must be made within a 90-day period. Plaintiff neither inquired as to why the protest was untimely nor did it file a complaint with the Tax Court.

On December 17, 1996, the Division's Judgment Section advised plaintiff that his protest was received and that the corporate tax liability was fixed because there was no timely challenge to the corporate determination. Plaintiff was simultaneously advised that the issue of his personal liability for taxes could be challenged if he filed a proper protest. Furthermore, plaintiff was notified that a Certificate of Debt would be filed against the plaintiff if the information were not supplied by January 10, 1997. Neither the plaintiff nor plaintiff's representative responded to the Division's December 17, 1996, letter. On January 17, 1997, the Division sent a notice to plaintiff advising him that on January 16, 1997, the Division entered a Certificate of Debt against him as a responsible person of his corporation.

There was no communication from plaintiff or his representatives until March 25, 1999, when plaintiff filed a motion in Superior Court seeking an order to vacate the judgment. The Superior Court judge denied the motion because the Tax Court had jurisdiction and allowed plaintiff 30 days to file the application with the Tax Court. Plaintiff then filed a motion similar to the one filed in Superior Court.

The Court granted the Division's motion to dismiss the complaint for untimely filing. The Court ruled that plaintiff had adequate notice of the nature and extent of the tax liability imposed both on the corporation and him personally because (1) plaintiff's wife had signed for notices of both the corporate assessment and the responsible person assessment, (2) the certification of plaintiff's accountant indicated that plaintiff was aware of the notices at least by November 1996, (3) although plaintiff requested a hearing in November 1996, plaintiff did not file a conforming protest in accordance with N.J.A.C. 18:1-1.8 or respond to or comply with Division communications thereafter, and (4) plaintiff did nothing more until over two years later when it filed a motion in Superior Court. The Court also ruled that the Division's notices provided plaintiff with an opportunity to be heard but plaintiff did not avail himself of that opportunity in a statutorily timely manner.

Refund Claims
Amplicon, Inc. v. Director, Division of Taxation, decided September 18, 1998; Tax Court No. 000413-98; Motion for Reconsideration denied March 11, 1999, No. M3031-98, aff'd; Appellate Division, No. A-1295-98T5 (March 10, 2000). The Appellate Division affirmed the Tax Court's ruling that the statutory provision permitting the filing of a refund claim within four years of payment does not apply to the situation where the payment was made pursuant to an assessment and the taxpayer either had an administrative hearing or failed to timely file for a hearing or appeal. (See N.J.S.A. 54:32B-20(b)). The Tax Court noted that audits would never close if extended statute of limitations were permitted as there could be repeated and endless attempts to seek refunds.

Subject Matter Jurisdiction
Frank Scallo v. Director, Division of Taxation, decided July 10, 1998, clarified August 26, 1998; Tax Court No. 000387-1998; aff'd; Appellate Division, No. A-7216-97T1 (March 20, 2000). On June 28, 1996, the Division sent plaintiff a Notice of Finding of Responsible Person Status which granted the right to an administrative hearing if the plaintiff applied for a hearing within 90 days of the notice. On January 16, 1997, the Division filed a Certificate of Debt against plaintiff. On April 23, 1997, plaintiff requested an administrative hearing challenging his status as a responsible person. Plaintiff's request was denied due to its untimeliness. Thereafter, plaintiff filed a complaint with the Tax Court.

The Tax Court dismissed the complaint for failure to state a claim upon which it could grant relief as plaintiff did not file a timely appeal to Tax Court. Essentially, plaintiff's request for an administrative hearing was untimely as the April 23, 1997, request for a hearing was more than 90 days after the Division's June 28, 1996, mailing of the Notice of Responsible Person Status.

Therefore, the Tax Court complaint was also untimely. The Appellate Division affirmed and noted the following:

1. Taxpayers must comply with all statutory requirements to appeal a tax assessment, including time limits for appealing to the Division of Taxation or the Tax Court;
2. If the time limit for an appeal is not met, there is "no inequity in ignoring the substantive claims" of a taxpayer and the complaint must be dismissed;
3. Certificate of Debt instruments are not judgments subject to review;
4. Taxpayers have a duty to know the law because the governing tax statutes "lay out the rights and duties of taxpayers" and their rights and duties can easily be discovered;
5. The 90-day appeal period is a reasonable time to "attack the validity of any assessments" and "it is the responsibility of taxpayers to determine whether the tax assessment is correct" or incorrect, within that time; and
6. The Division of Taxation is encouraged to file dispositive Motions to Dismiss in lieu of answers, where appropriate, which preserves judicial resources and economy.

Division's Duty to Provide Notice of Changes to Tax Statutes
Schirmer-National Co. v. Director, Division of Taxation, 17 N.J. Tax 495 (Tax Court 1998); Motion for Reconsideration, *denied* January 4, 1999; No. M00348-96, *aff'd,* Appellate Division, No. A-3877-98T2 (March 31, 2000). The Tax Court followed its decision in *Aetna Burglar & Fire Alarm Co. v. Director, Div. of Taxation*, 16 N.J. Tax 584 (Tax Court 1997) that alarm monitoring services carried through telephone telecommunications are subject to sales tax pursuant to P.L. 1990 c. 40.

Plaintiff also argued that the provisions of P.L. 1990 c .40 were so broad in taxing telecommunications that the sale of burglar alarm monitoring services should not be subject to tax until the time the Division provided proper notice of the tax law change. The Tax Court ruled that taxpayers are "put on notice of legislative enactments on the date the legislation becomes effective." Consequently, the Division of Taxation was not obligated to provide taxpayers with notice of changes in the tax law. The Appellate Division affirmed.

Bankruptcy Discharge
Lloyd M. Cohen v. Director, Division of Taxation, decided June 13, 2000; Tax Court No. 008458-96. Plaintiff confessed to embezzling approximately two million dollars from his clients/creditors. The Chancery Division of the Superior Court appointed a custodial receiver to marshal assets and collect embezzled monies to satisfy the claims of the victims. In the process, the receiver entered into a closing agreement with the Internal Revenue Service and the Division where New Jersey gross income tax returns (NJ-1040s) were filed for the periods 1986 through 1994 and taxpayer, not the receiver, would be responsible for payment of any tax, penalty, and interest. Pursuant to a court order, plaintiff and other interested parties were notified of the proceeding that approved of the terms and conditions of the closing agreement including the understanding that plaintiff was the sole and primary person responsible for payments of tax, penalty, and interest.

On July 24, 1996, the Division issued an assessment against plaintiff for the above mentioned tax liability. Plaintiff filed a timely complaint in Tax Court challenging the Division's assessment primarily on the grounds that the assessment was not valid against him personally because the NJ-1040s were filed by his custodial receiver. Plaintiff also filed for Chapter 7 with the United States Bankruptcy Court and the petition included the tax liabilities pertaining to the July 24, 1996, assessment. On or about February 14, 2000, the Bankruptcy Court granted plaintiff a Chapter 7 discharge.

On January 6, 2000, the Division filed a motion for summary judgment to dismiss plaintiff's complaint. After numerous adjournments to allow plaintiff time to respond, plaintiff's only submission was a copy of the order granting his Chapter 7 discharge.

The Court validated the Division's July 24, 1996, assessment by granting summary judgment in favor of the Division because plaintiff failed to present facts in opposition to the Division's motion. Failure to do so deemed the facts, as set forth by the Division, undisputed. The Court ruled that the receipt of a bankruptcy discharge does not invalidate Tax Court proceedings and that the issue of the discharge should be litigated in Bankruptcy Court because of its significant expertise.

Statute of Limitations and Record Retention
Alpha I, Inc., v. Director, Division of Taxation, decided June 13, 2000; Tax Court No. 00373-1999. Plaintiff did not provide the Division with purchase records to support the expenses pertaining to the first quarter of 1994. Therefore, the Division determined the use tax liability for the

first quarter of 1994 by extrapolating the results of their examination of records pertaining to subsequent periods two to three years thereafter.

Plaintiff claims that the use tax assessment should be set aside because there was no requirement to retain purchase records for longer than three years pursuant to N.J.S.A. 54:32B-16. However, under N.J.S.A. 54:32B-27(b), the Director is permitted to issue assessments of sales and use tax for up to four years from the date of the filing date of the return.

In upholding the Division's assessment as timely in conformity with the statute of limitations on assessments, the Court rationalized that to quash the assessment "would in effect reward taxpayer for destroying records that are still subject to an audit and additional assessment." The Court ruled that the three-year retention period set a minimum time period to retain records and that "[a]lthough the taxpayer was not required to keep records beyond this three-year period, destruction of the records would put the taxpayer in jeopardy because additional assessments may be levied until the expiration of the four-year statute of limitations." Therefore, the Court opined that taxpayer placed itself in peril by disposing of their records prior to the expiration of the statute of limitations period.

Corporation Business Tax

Receipts Includable in Numerator of Allocation Factor *Stryker Corporation v. Director, Division of Taxation,* decided August 16, 1999; Tax Court; No. 004852-96. At issue is whether the Division properly included in the numerator of the receipts fraction all receipts generated by drop shipment transactions occurring in New Jersey destined for out-of-State customers.

Osteonics Corporation, a New Jersey corporation, is the wholly-owned subsidiary of plaintiff, a Michigan corporation. Both plaintiff and Osteonics are located in the same building in Allendale, New Jersey. Plaintiff paid all the real estate related costs.

Osteonics' sole function was to receive and process customer orders for plaintiff's products manufactured at the New Jersey plant. Osteonics then placed its order with plaintiff. Plaintiff packed and shipped the products to Osteonics' customers via common carrier, F.O.B. Allendale, throughout the United States. Thereafter, Osteonics would bill its customers.

Although plaintiff did not invoice Osteonics for each order, company representatives reviewed Osteonics' sales receipts in order to determine price and profit allocations. Essentially, Osteonics retained a gross margin of approximately twenty percent.

As regards to sales to Osteonics, plaintiff allocated sales by the shipment's destination state. Accordingly, for tax purposes, plaintiff included sales of only New Jersey destination shipments in the numerator of the receipts fraction on its New Jersey corporate business tax return. Pursuant to an audit, the Division determined that all sales to Osteonics should be included in the numerator of the receipts fraction regardless of destination.

The Court held that plaintiff's sales receipts from its direct shipments to Osteonics' out-of-State customers to Osteonics are includable in the numerator under N.J.S.A. 54:10A-6(B)(6). The Court found that this statute required inclusion in the numerator of all receipts earned by the taxpayer in New Jersey including the intrastate transactions between plaintiff and Osteonics.

Standing to Appeal
Richard Pobuta v. Director, Division of Taxation, decided October 8, 1999; Tax Court; No. 002054-99. Plaintiff filed the complaint challenging the interest due on corporation business tax and sales and use tax owed by Campin Corporation as well as the gross income tax owed by plaintiff and his wife.

The Court held that Richard Pobuta lacked standing to appeal the corporate tax liabilities even though he was the sole officer, shareholder, and director of the corporation. Citing *Rule* 1:21-1 of the *New Jersey Court Rules*, the Court ruled that only an attorney may file an appeal concerning corporate tax liabilities.

The Court held that it lacked jurisdiction to reduce interest below statutory minimum absent plaintiff's reasonable reliance on the Division's written advice furnished to the plaintiff. After establishing that interest was imposed at statutory minimum and there was no allegation of reliance on erroneous advice, the Court dismissed plaintiff's complaint.

Gross Income Tax

Taxability of Foreign S Corporation's Income to NJ Resident
Vincent Mancini v. Director, Division of Taxation, decided March 19, 1999; Tax Court; No. 2892-98. Plaintiff

is a New Jersey resident that owns a 25% interest in a corporation located in Pennsylvania that elected S corporate status for both Federal and Pennsylvania income tax purposes. Plaintiff's New Jersey gross income tax return did not report his pro rata share of income from this foreign S corporation. However, plaintiff's pro rata share of S corporation income was reported on his personal Federal income tax and Pennsylvania nonresident income tax returns.

The Court noted case precedent holding that a state has nexus to tax its residents or domiciliaries on all their income regardless of the source of that income. (Citing *Cohen v. Graves*, 300 U.S. 308, 312-314 (1937); and *Hoe v. Division of Taxation*, 2 N.J. Tax 67, 72 (1980 Tax), *aff'd,* 4 N.J. Tax 528 (1981 App. Div.)*, cert. denied,* 87 N.J. 418 (1981)).

After examining the New Jersey Gross Income Tax Act, the Court found that the legislative intent was to tax a resident taxpayer's share of S corporation income as allocated to the resident pursuant to N.J.S.A. 54A:5-86 regardless of either the location of the S corporation or whether the corporation elected New Jersey S status. Therefore, the Court held that plaintiff was taxable on his pro rata share of the Pennsylvania S corporation income as calculated under the New Jersey Gross Income Tax Act.

Interest Deduction for Loan for Capital Contribution
John W. Dantzler, Jr. and Kathleen M. Dantzler v. Director, Division of Taxation, decided June 1, 1999; Tax Court; Motion for Reconsideration, denied, October 22, 1999; No. 006040-96. On defendant's motion for reconsideration, the Court declined to change its determination that interest on plaintiff's loan used to make his partnership capital contribution is a deductible business expense under the Gross Income Tax Act.

In essence, plaintiff borrowed money from the partnership for his capital contribution. Thereafter, plaintiff borrowed money from Citibank and repaid the loan to the partnership. At issue is the Citibank loan interest that was paid by the partnership to Citibank and withheld from amounts that would otherwise have been distributed to plaintiff.

Employee Status
Charles & Kathleen Santilli v. Director, Division of Taxation, decided July 26, 1999; Tax Court No. 5532-98. The Division determined that plaintiff was an employee based upon the following facts. Plaintiff received two 1994 W-2 statements from Prudential Insurance Company. Both showed Federal wages and FIT withholding, social security wages and withholding, medicare wages and withholding, excess group life insurance costs, employee's 401(k) retirement plan, pension plan, and deferred compensation. The other also showed withholding for NJ HCF and NJ WDF. However, neither W-2 checked the box for statutory employee. On plaintiff's 1994 income tax returns, plaintiff deducted $100 for a Keogh retirement plan and self-employment (SEP) deduction and nothing under the half of self-employment tax, line 25, of the return. Furthermore, plaintiff did not report anything on the self-employment schedule under self-employment tax on the 1994 Federal return except for an entry of zero on line 12 where a handwritten note states refer to the W-2.

Plaintiff claimed that the W-2 was issued because plaintiff was a full-time insurance salesman who was subject to FICA and an employee as defined by Internal Revenue Code section 312(d), but otherwise not considered an employee and was labeled self-employed pursuant to Revenue Ruling 90-93.

The Court ruled that although a W-2 customarily indicates an employer/employee relationship where taxes are withheld, it is not definitive. In making its determination, the Court applied the fourteen-factor test of N.J.A.C. 18:35-7.1(b) and compared the case of *Pope v. Director, Division of Taxation*, 4 N.J. Tax 268 (Tax Ct. 1982). After weighing all the relevant factors, the Court held that during the 1994 tax year plaintiff was not an employee of Prudential. The Court based its decision upon its finding that (1) the contract classified plaintiff as an independent contractor, (2) plaintiff sold insurance for approximately 26 other companies, (3) Prudential did not restrict plaintiff's geographical territory or control who he could hire, (4) plaintiff did not report to a Prudential employee, (5) there was no advertising that indicated plaintiff was a Prudential agent, (6) plaintiff incurred all expenses for his office, supplies, advertising, and entertainment expenses related to selling insurance, (7) Prudential paid plaintiff only a commission for new policies and renewals, (8) Prudential did not cover plaintiff under workmen's compensation insurance, and (9) although Prudential provided plaintiff with benefits, family medical, prescription, and dental, a pension, covered him under a disability plan and a 401(k) where Prudential matched his contribution, that these benefits were an entitlement based upon the amount of sales an agent produced for Prudential.

Statute of Limitations and Death Benefits
Joyce H. Eiszner v. Director, Division of Taxation, decided January 21, 2000; Tax Court No. 005058-98. Plaintiff relocated her residence to Illinois in July 1991, approximately ten months after the death of her husband.

At the time of his death, the husband was a New Jersey resident who was employed in New Jersey by CPC International, Inc. (“CPC”). CPC provided performance plans consisting of stock and stock options that are contingently granted to current employees. However, if an ex-employee died, retired, became disabled, or left by reason of voluntary separation, the board of directors had discretion as to whether a payment would be made. Immediately after the death of plaintiff’s husband, the board of directors authorized payment to her husband’s estate. The payment was distributed in 1992 and transferred to the husband’s revocable trust, a New Jersey Resident Trust. The trust distributed these monies to plaintiff.

Both the husband’s estate and trust each filed a 1992 Gross Income Tax Fiduciary Return in 1993. The estate return included the CPC amount received under the performance plan and described it as shares and performance award. The return for the estate identified that the total amount was distributed to the beneficiary trust and listed plaintiff’s address, social security number, and her status as a New Jersey nonresident. The trust return reported the entire income from the estate and noted the distribution of that amount to the plaintiff as beneficiary.

The plaintiff filed a 1992 New Jersey Gross Income Tax Nonresident Return on August 10, 1993 seeking a refund of first quarter estimated tax payments inadvertently paid to New Jersey. Attached to the New Jersey return was her 1992 Illinois Individual Tax Return with the “Supplement to Illinois” 1992 Federal Form 1040 U.S. Individual Income Tax Return. Although the New Jersey return reported the net amount of CPC’s payment to her husband under “Amount of Gross Income Everywhere,” it did not explain the nature and source of the income, it reported no income from New Jersey sources as well as no New Jersey tax due, and the New Jersey Estate and Trust Fiduciary Returns were not attached.

Approximately four years after plaintiff’s filing of her 1992 New Jersey nonresident return, the Director sent a Notice of Deficiency for the amount of tax owing on the CPC performance plan payment from which plaintiff timely protested. Thereafter, plaintiff timely appealed the Director’s Final Determination upholding the tax assessment on grounds that the Final Determination was issued beyond the three-year statute of limitations and, alternatively, that the CPC payment constituted a death benefit which is excluded from New Jersey gross income.

The Director conceded that the assessment was made beyond the three-year statute of limitations, however, it claimed that the assessment was subject to the six-year statute of limitations under N.J.S.A. 54A:9-4(d). This statute essentially provides that tax assessments may be made within six years after the return was filed where an individual omits more than 25% of the amount of New Jersey income stated in the return without disclosing the nature and amount of the income either “in the return, or in a statement attached to the return, in a manner adequate to apprise the Director of the nature and amount of such item.” As there was no doubt that more than 25% of New Jersey income was omitted, the Court focused on whether the statutory disclosure requirement as stated on the return was met.

There was no previous authority interpreting N.J.S.A. 54A:9-4(d). Therefore, plaintiff urged the Court to interpret the disclosure requirement in accordance with rulings concerning the virtually identical section 6501 of the Internal Revenue Code (“Code”). Although the Code and New Jersey statute both require adequate disclosure of both the nature and amount, the Court found that the cited Federal cases focused on the amount component because the state source of the income, the nature component, is irrelevant in the Federal taxing model. Therefore, the Court adopted a common sense approach to determine whether the return’s disclosure provided a “clue” as to the nature of the income omission.

The Court held that the Director’s assessment was not time-barred by the three-year statute of limitations because plaintiff’s nonresident New Jersey and the attached Illinois and Federal returns disclosure of the source or nature of the income was inadequate to apprise the Director that the income was New Jersey sourced. The Court noted that the required Schedule E was not submitted to the Division along with the Federal return and that the Schedule E would have identified the source of the funds. Furthermore, the Court ruled that the Director has no duty to cross reference different returns filed by different entities not attached to plaintiff’s individual return.

Turning to the issue of whether the plan payment constituted an employee death benefit paid by or on behalf of CPC by reason of the death of plaintiff’s husband, which is excludable from gross income under N.J.S.A. 54A:6-4b, the Court held that it was not a death benefit because death did not trigger the payment. The Court found that the CPC plan made payments as a result of participation in the plan and not necessarily because of death as other employment-terminating factors, disability, retirement, and voluntary separation, also might result in a plan payment. Therefore, the Court ruled that the plan payment constituted deferred compensation under an incentive compensation plan that is includable in plaintiff's gross income.

Partner's Distributive Share
Ronald J. Gumbaz v. Director, Division of Taxation, decided March 30, 2000; Tax Court No. 3494-97. Since 1981, plaintiff retained a 25% partnership interest in MTSG. Plaintiff's capital contributions to the MTSG partnership had a balance of $20,883 as of 1993. However, plaintiff's balance in his MTSG capital account was negative $28,403 as of December 31, 1993 due to partnership losses over the years.

In 1993, MTSG's amount of net income earned from its only investment in One Arkansas Associates was $60,528 and it received $868 in cash. MTSG reported plaintiff's distributive share of partnership income as $15,132 and distributed $217 to plaintiff. Plaintiff's Federal tax return also reported a $47,010 loss from an S corporation. Plaintiff did not own interests in any other partnership in 1993.

Plaintiff's 1993 NJ-1040 reported zero income for plaintiff's distributive share of partnership income. The Division adjusted plaintiff's 1993 NJ-1040 return Line 20, Distributive Share of Partnership Income, from $0 to $15,132. Plaintiff claims that this income is not taxable because either (1) the income should be considered as a return of capital, (2) that the partnership income should be netted against the Subchapter S corporation loss or (3) that only the distribution received by him should be subject to tax. As discussed below, the Court rejected plaintiff's theories and held that plaintiff's $15,132 distributive income share of partnership income is taxable under N.J.S.A. 54A:5-1k.

Distribution: N.J.S.A. 54A:5-4 states that a partner's distributive share of partnership income or gain received by the partnership shall be subject to tax whether or not distributed. Plaintiff claims that the partnership actually received $868 and therefore that, not the $15,132, should be the basis for his New Jersey income tax as he is a cash basis taxpayer. The Court responded that the $60,528 of net income MTSG earned from One Arkansas Associates indicates the amount of income that MTSG has the power to demand distribution of from One Arkansas Associates. The fact that MTSG chose not to withdraw the full amount does not mean it was not earned or available to the partnership. Furthermore, the Court stated that "received" does not mean that the income must be physically or actually put in your hand. Therefore, the Court ruled that regardless of MTSG's actual withdrawals, MTSG received $60,528 of income from One Arkansas Associates of which $15,132 is plaintiff's 25% taxable portion regardless of whether the partnership actually received the money.

Return of Capital: Plaintiff claims that he is being taxed on the return of capital because he has a negative MTSG capital account balance and he has not yet realized his investment in the partnership. The Court ruled that plaintiff's distributive share of partnership income could not be considered a return of capital because in order for the income to be characterized as a return of capital the partnership interest must be sold.

Netting of Income and Losses: Plaintiff contends that he should be permitted to offset the 1993 partnership income against prior year partnership losses because he received no New Jersey tax benefit for partnership losses prior to 1993. The Court ruled that the Gross Income Tax Act does not specifically provide for a loss carryforward and therefore a taxpayer forfeits the loss if it cannot be offset by income in the same tax year.

Alternatively, plaintiff claims that he should be able to offset his 1993 $15,132 partnership gain against the 1993 $47,010 loss of the S corporation. The Court found that N.J.S.A. 54A:5-2 prohibits an inter-category offset by not permitting a taxpayer to apply losses within one category of gross income against gross income of another category. In 1993, New Jersey did not recognize S corporations and therefore there was no category of gross income to offset. In 1994, N.J.S.A. 54A:5-1p was added to tax the net pro rata share of S corporation income; however, the Court found that these are two separate categories of gross income and an inter-category offset is prohibited.

Interest Deduction – Acquisition Indebtedness to Purchase Shares in S Corporation
Carol and David Sidman v. Director, Division of Taxation, decided April 24, 2000; Tax Court No. 1031-99. Plaintiff David Sidman was a 4.32% shareholder in a corporation that qualified as a New Jersey subchapter S since January 1, 1994. In 1993, plaintiff purchased an additional interest in the corporation from two other shareholders so that he controlled 91.4% of the corporation. Terms of the purchase were a down payment of approximately 7% and equal monthly payments over 15 years with interest at 8%.

At issue is whether a subchapter S shareholder may deduct interest paid on a loan used to purchase shares in the corporation to determine net pro rata share of S corporation income. The Court found that N.J.S.A. 54A:5-1p was the applicable provision associated with this issue and simply stated that gross income includes the taxpayer's net pro rata share of the S corporation's income. The

Court stated that neither was there a New Jersey statute that permitted shareholders to deduct interest pertaining to their acquisition indebtedness concerning an S corporation nor did N.J.S.A. 54A:5-1p or its legislative history reference the application of Federal principles to this issue. Therefore, the Court held that there was no authority to permit plaintiff to deduct interest pertaining to the S corporation acquisition in determining the net pro rata share of his S corporation income.

Claim for Refund Following Paid Assessment
Pamela Cater and Thomas P. Rowe v. Director, Division of Taxation, decided April 28, 2000; Tax Court No. 002224-1999. In April 1993, the Division issued a deficiency assessment for the amount plaintiffs claimed as a credit for taxes paid to other jurisdictions on their timely filed 1989 New Jersey gross income tax return. Plaintiffs filed a petition for a redetermination of the deficiency under N.J.S.A. 54A:9-9(b). After an administrative conference was held, the Director's July 1994 final determination disallowed the claimed credit. In August 1994, plaintiffs paid the deficiency and did not exercise their right to file a complaint with the Tax Court.

In January 1999, plaintiffs requested a refund by filing an amended 1989 New Jersey gross income tax return that claimed the same credit for taxes paid to other jurisdictions as the original 1989 return. The Division denied the refund request in January 1999 and noted as it did in its March 1999 final determination that this same matter was previously heard and decided in the prior July 1994 final determination. Thereafter, plaintiffs filed a complaint with the Tax Court.

As a general rule, N.J.S.A. 54A:9-8(a) provides that generally a taxpayer must file a refund claim within the later of three years from the time the return was filed or two years from the time the tax was paid. Although plaintiffs concede that the refund claim is untimely under 54A:9-8(a), plaintiffs claim that this general rule is inapplicable because they filed a timely petition for redetermination of the deficiency under N.J.S.A. 54A:9-9(b) and therefore their refund claim lies within the exception of N.J.S.A. 54A:9-8(e). First, the Court ruled that section N.J.S.A. 54A:9-8(e) does not extend the time a taxpayer has to file a refund claim. Secondly, the Court ruled that although N.J.S.A. 54A:9-8(e) permits the Director to determine whether or not a taxpayer made a tax "overpayment" that can be credited to the taxpayer after the expiration of the applicable period of limitations, the payment of a deficiency assessment does not constitute an "overpayment." Therefore, the Court found that 8(e) was inapplicable to the instant case.

The Court found that the Director could consider a refund claim involving a paid gross income tax additional assessment under N.J.S.A. 54A:9-10(b). That section permits a taxpayer to file a refund claim provided that taxpayer did not protest or appeal from the additional assessment of tax. As plaintiffs previously protested the additional 1989 assessment, the Court found that this section was inapplicable.

The Court dismissed plaintiffs' complaint for untimely filing. Furthermore, the Court noted that the application of the *res judicata* doctrine was also appropriate in this case. The Court stated that the Division's denial of plaintiffs' 1993 petition for redetermination of the 1989 tax deficiency involving the claim for credit for taxes paid to other jurisdictions was exactly the same issue plaintiffs presented in their 1999 refund claim. "The doctrine of *res judicata* is designed to bar relitigation of a cause that has been finally determined between the parties on the merits by a tribunal with appropriate jurisdiction. See *Roberts v. Goldner*, 79 N.J. 82, 85 (1979). Our Supreme Court has observed that, as a general rule, an adjudicative decision of an administrative agency should be accorded the same finality that is accorded the judgment of a court. See *Bressman v. Gash*, 131 N.J. 517, 526. I have concluded that an application of the doctrine is appropriate in this case." Opinion, page 6.

Period to File Refund Claim
Clifford D. Wenrick v. Director, Division of Taxation, decided May 12, 2000; Tax Court No. 003571-99. Plaintiff filed his 1994 New Jersey gross income tax return (NJ-1040) on May 28, 1998, claiming a $699 refund due to excess employer income tax withholding. Although plaintiff alleges that he filed for and was granted an extension for the 1994 Federal tax return, an extension was not requested in New Jersey.

The Court found that N.J.S.A. 54A:9-8(a) was the operative statute relating to limitations on refund claims concerning New Jersey gross income tax. This statute states that the amount of the refund "shall not exceed the portion of tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return."

The Court ruled that obtaining a Federal extension in and of itself does not automatically trigger a New Jersey extension. N.J.A.C. 18:35-6.1(a) permits a four-month extension to file the NJ-1040 where by the original due date of the NJ-1040, the taxpayer, at the time of application for Extension To File (1) paid 80% of the tax liability computed on the NJ-1040 when filed and (2) attached a copy of the application for automatic Federal extension. As plaintiff never filed a request for extension with New Jersey, the Court ruled that plaintiff was not entitled to the four-month extension.

Due to the May 28, 1998, filing of the NJ-1040, the Court ruled that plaintiff was entitled to a refund of 1994 taxes to the extent they were overpaid three years preceding the date the return was filed, between May 28, 1998, and May 25, 1995. As the employer-withheld taxes were deemed paid on April 15, 1995, per N.J.S.A. 54A:9-8(h), the original 1994 NJ-1040 due date, the taxes at issue are more than three years after the date of payment. Therefore, the Court denied plaintiff's refund request.

Local Property Tax

Added Assessment on Improvements
Michael Otelsberg v. Bloomfield Township, decided June 25, 1999; Tax Court of New Jersey, No. 000128-97. Decision addressed the validity of a 1997 added assessment imposed on taxpayer's property for alleged improvements after October 1, 1996. Plaintiff purchased the three bedroom, single family home on December 10, 1996, for $135,000. He contended that the house contained several negative features: unpleasant odors, an outmoded kitchen, and other neglect and physical deterioration. Taxpayer himself completed renovations in January 1997 including replacement of the carpet in the living room, dining room, hallway, and three bedrooms; renovation of the kitchen with new cabinets; and new interior painting. He did not file permits for any of the work performed. After he had received his 1997 notice of assessment for $162,300, he filed a petition of appeal to the Essex County Board of Taxation.

At the May 1, 1997, hearing, both the taxpayer (appearing pro se) and the assessor agreed that the 1997 assessment would be reduced to $135,000 (the purchase price). Taxpayer testified that the assessor did not indicate during the settlement conference that the municipality would later impose an added assessment on the subject property. On May 16, 1997, the County Board entered judgment reducing the assessment in accordance with the agreement.

After the execution of this judgment, the municipality levied an added assessment of $36,700 for the improvements to the property for 1997, and prorated it for six months at $18,350. On appeal by taxpayer, the County Board upheld the added assessment, which determination was subsequently appealed to the Tax Court.

The Tax Court found that the added assessment on the taxpayer's property for the 1997 tax year is valid. N.J.S.A. 54:4-63.3 grants the authority to a municipality to impose an added assessment on a property, when the building or structure has been "erected, added to or improved after October 1, and completed between January 1 and October 1." The Tax Court referred to its decision in *Harrison Realty Corp. v. Town of Harrison,* 15 N.J. Tax at 385, defining the term "improved" as:

> The mere retrofitting, upgrading or remediation of deferred maintenance does not constitute an addition to the property; nor does it constitute an improvement. The term "improved," as used in the statute must, under the doctrine of *ejusdem generis*, be read in the context of the word "added" as used in this statute. That is to say, an improvement is in the nature of an addition.

There is no other case law other than the *Harrison* decision to provide guidance to the meaning of "improved" as found in the statute. Black's Law Dictionary defines improved as "to meliorate, make better, to increase the value or good qualities of, mend, repair…." It is a settled principle of statutory construction that "the language of a statute should be given its ordinary meaning and construed in a common sense manner to accomplish the legislative purpose."

The Tax Court also cited its decision rendered in *Snyder v. South Plainfield Borough*: "Without the added assessments, an improved property would escape taxation for a period of several months until the next regular assessment date." The taxpayer contends that the May 16, 1997, judgment reflects the true value of the subject property and binds the municipality to that assessment. The Tax Court found that, consistent with the *United States Postal Serv. v. Town of Kearney* decision, the executed stipulation of settlement in this litigation related only to the assessment under review at the time the settlement was made. The added assessment was not yet levied on May 1, 1997, nor was it before the County Board when they entered judgment based upon the stipulation of settlement.

Taxpayer has the burden of proof to establish by a preponderance of the evidence that the assessment appealed from is invalid. The Tax Court ruled that Otelsberg did not present any competent method of valuation. He did not present expert testimony or an appraisal report during trial. He relied solely upon his experience as the manager of a local real estate office to testify about his general knowledge of real estate values in the Township. He did not testify as to value nor did he produce sales of comparable properties from which to draw a conclusion of value.

The municipality presented its assessor as an expert witness. He had an appraisal report, using comparable sales as an approach to valuation. He made adjustments to the subject property, concluding that the value of the subject property is $171,700. Although he acknowledged his inability to gain access to the interior of some of his comparable sales, the evidence submitted by the municipality was more reliable than any evidence that the taxpayer submitted, the Tax Court concluded.

A municipality is empowered by the added assessment statute to levy additional taxes to a property where there has been an increase in the value to the property. The Court stated that all the improvements that the taxpayer made created a significant increase in the value to the property. The taxpayer cannot rely solely on the notion that the improvements made on the subject property were not additions; this was not a significant issue. The added assessment was valid, and a judgment was entered for 1997 for $36,700 (prorated for six months).

Property Tax Assessment Reduced
Theodore Cohn v. Livingston Township, decided July 6, 1999; Tax Court of New Jersey, No. 004778-98. Local property tax appeal involves the one-family ranch home in Livingston Township. Plaintiff (Cohn) appealed the property's 1998 assessment ($103,000) to the Essex County Board of Taxation which reduced the assessed value to $83,100. Plaintiff appealed from that determination.

Taxpayer appeared pro se. He was not an appraisal expert, and thus could not testify as an expert witness. He submitted four comparable sales in a timely manner ranging in price from $210,000 to $285,000, but he arrived at his estimate of value by averaging the four sales prices ($260,000) without making adjustments between the comparable sales and the subject property. He provided no appraisal report.

His primary argument involved the subject's proximity to high tension wires in the rear of the property. Review of tax maps and photographs of the subject property showed that a child residing at the taxpayer's property would easily be able to have contact with the stanchion that holds the high tension wires. He also pointed to his rear yard slope and a drainage ditch on the rear edge of the property that causes flooding of his rear yard.

The municipality's real estate appraiser qualified to testify as an expert witness. He also used four comparable sales ranging in price from $233,000 to $310,000. Three of the four sales were located on different streets, distant from the subject property and, thus, clearly further from the high tension wires. He provided an adjustment grid demonstrating usual adjustments for size, age, location and amenities. The appraisal expert's opinion of value of the subject property based upon the market sales approach was $320,000. This expert witness did not make adjustments for the existence of the slope and drainage ditch on the subject property or for the proximity to the high tension wires, however.

The Tax Court is authorized by statute to consider reliable evidence from a pro se litigant, even if such evidence is not derived from expert opinion. It stated that the taxpayer's comparable sales provided reliable evidence from which the Court can glean value. The Court is not bound to accept any or all of the expert's testimony.

The Court examined the comparable sales provided and determined that the residential properties most approximate to high tension wires had a lower market value. The expert witness had not considered proximity to the wires an important factor. The plaintiff had thought that this negative factor was very relevant.

The Court found that, as of October 1, 1997, the relevant assessment date, the appraised value of the subject property was $275,000. It then determined whether or not the taxpayer is entitled to discrimination relief on the basis of Chapter 123, or N.J.S.A. 54:51A-6. Livingston Township's average ratio, as promulgated by the Director of the Division of Taxation for 1998, was 26.80%, with an upper limit of the common level range of 30.82% and a lower limit of 22.78%. The Court calculated the ratio of the original assessment ($103,900) to true value as found by the Tax Court ($275,000) at 37.78%, clearly above the upper level (30.82%) of the common level range. This entitled the taxpayer to Chapter 123 relief. When the Chapter 123 ratio of 26.80% was applied to the Court's finding of true value ($275,000), the resulting assessment for the subject property is $73,700. Judgment for 1998 was entered for an assessment as follows:

Land	$28,900
Improvement	44,800
Total	$73,700

Failure to File Timely Complaint
Regent Care Center, Inc. v. Hackensack City, decided November 16, 1999; Tax Court of New Jersey, No. 005835-97. Plaintiff (Regent Care) moved to compel defendant (Hackensack City) to produce certain documents in a local property tax appeal after which the municipality

cross moved for dismissal of the taxpayer's complaint. Cross motion is based upon defendant/municipality's contention that taxpayer failed to timely file its complaint to the Tax Court by April 1, 1997, as required by N.J.S.A. 54:3-21.

The subject property in Hackensack is utilized as a nursing home. The assessor submitted a timely 1997 tax list to the County Board of Taxation that indicated a total assessment for the subject property of $8,090,300. In 1996, the assessment was $4,390,200. Taxpayer acknowledged receipt of a February 1 notification card that indicated the assessment to be $4,390,200. However, a second Chapter 75 notification card was mailed to the taxpayer correcting the previous erroneous notice and informing the taxpayer that the accurate assessment for 1997 would be $8,090,300. The taxpayer denied that it ever received this second notification. There is evidence that the company engaged to prepare and forward the notices of assessment for the municipality had performed a special mailing of Chapter 75 notices on February 28, 1997. No specific proof was submitted to show that the plaintiff received the corrected notice. Thus, the Tax Court determined that the municipality failed to produce sufficient evidence that the corrective notice was mailed to or received by the taxpayer. The taxpayer claimed that it became aware of the assessment increase when the tax bill for the third and fourth quarter of 1997 was received. The municipality demonstrated the mailing of said tax bills on July 11, 1997. Upon receipt of the tax bill toward the end of July 1997, plaintiff contacted the assessor's office and inquired about the increased assessment. In response, the assessor's office confirmed the increase in writing by letter dated July 29, 1997. Thus, the Court stated irrefutably that the tax bill was received between July 11 and July 29.

On September 15, 1997, taxpayer filed a verified complaint seeking temporary restraints to prevent the municipality from collecting and imposing interest on unpaid taxes as well as a proposed order for expedited discovery. On September 16, 1997, the parties presented oral argument before another Tax Court judge on the issue of restraints, which request was denied on the record. Taxpayer was advised by that judge to resubmit its litigation by means of a standard complaint for relief to the Tax Court that was accomplished on September 19, 1997.

The Tax Court found that fairness requires that this taxpayer should receive a reasonable time within which to appeal. The Court thoroughly analyzed N.J.S.A. 54:3-21 in this matter, and deemed forty-five days from the taxpayer's receipt of the third and fourth quarter tax bill as appropriate. However, the taxpayer did not file its appeal within forty-five days of the receipt of the tax bill. Its first attempt at filing a complaint with the Tax Court was an in lieu of prerogative writ action seeking temporary restraints filed on September 15, 1997, after the forty-five day filing period. Neither N.J.S.A. 54:3-21 nor any other legislation or case law addresses the unusual circumstance where the purported notice fails to indicate a correct assessment. N.J.S.A. 54:3-21 addresses the issue of a change in assessment. There was no notification of a change in assessment in this case as defined by N.J.S.A. 54:3-21. The taxpayer herein failed to file a tax appeal within the extended forty-five day period. The Tax Court thus granted the municipality's cross motion dismissing the taxpayer's complaint and denied the taxpayer's motion for discovery.

Assessment Affirmed

Hillcrest Health Service System, Inc. v. Hackensack City, N.J. Tax Court, November 20, 1998, 18 N.J. Tax 38 (1998). Hillcrest Health Service System, Inc. is the Title 15A nonprofit parent corporation of a nonprofit subsidiary which operates Hackensack Medical Center, a property tax exempt hospital under N.J.S.A. 54:4-3.6. At issue before the New Jersey Tax Court was the taxable/exempt status for 1992-1993 of an aggregated lot and four-story, 60,000 sq. ft. building being constructed on it, owned by Hillcrest but leased to the Medical Center. For tax year 1992 the assessor calculated a partial assessed value of $2,442,700 and upon completion of the structure applied a six-month prorated added assessment of $1,310,400; for 1993 (a revaluation year) the assessed value imposed was $4,557,100.

With respect to the 1992 partial assessment, Hillcrest contended that because the aggregated lot had, as separate lots, been used as parking space for the Medical Center, those lots and by extension the remaining land and incomplete structures should be property tax exempt based on their use for hospital purposes. As concerned the 1992 added assessment, Hillcrest maintained that hospital use existed as of completion of the improvements thereby voiding the added assessment. Finally regarding the 1993 regular assessment, Hillcrest asserted that the completed improvements were in actual use for hospital purposes on the assessment date and therefore qualified for tax exemption.

The City's main argument against exemption was that Hillcrest, the property owner, as distinguished from the Medical Center, the property user, was not organized exclusively for hospital purposes but rather a wide-ranging variety of health care activities and that certain activities, such as home care services, were distinct from hospital operations.

Per Hillcrest's Certificate of Incorporation, Hillcrest was "…at all times exclusively operated for the benefit of, to perform the functions of, or to carry out the purpose of, Hackensack Medical Center, Hackensack Health and Hospital Foundation, and other affiliated or related organizations, all of which are publicly supported health care organizations organized for the purpose of establishing, maintaining, sponsoring and promoting activities relating to the improvement of continuous human health and well-being…." Besides the Medical Center, Hillcrest's subsidiaries included Hackensack Medical Center Foundation, Inc., fundraising coordinator; Essex Parking Co., hospital parking garage operator; Bergen Home Health Services, personal in-home care provider; Bergen Health Management System, Inc., day-care center operator for hospital employees' children; Hillcrest Properties, Inc., real estate holding company; and Bergen Health Systems, hospital energy consumption efficiency analyst.

Except for that portion of the building utilized as an open-to-the-public fitness center, Hackensack City did not dispute that the building was used for hospital purposes once occupied, nor did it dispute that use on the completion date was a determinant of a valid added assessment. However, in addition to exclusive organization, the City argued that the previous exempt hospital parking use was independent from the later use and did not continue during the construction period.

Paraphrasing the Tax Court's reasoning, when the previously separate parking lots ceased to support the main medical facility its exempt use was interrupted. Even if the new building were exempt, it was a different building on a different site from which parking was formerly provided and as land can be nontaxable only in connection with an exempt building, the lot in question could be exempt only upon completion of the new building. Since a continuing exempt use for the former parking area could not be established, an exempt claim by extension for other property being constructed failed. Further, even where the character of a building in progress and its adaptation to exempt use are evident, it is only actual use which permits exemption. (*Holy Cross Precious Zion Glorious Church of God v. Trenton City*, 2 N.J. Tax 352 (1981)). The Court decided as well that the fitness center, available to the general public for a fee, was used more than incidentally for other than hospital purposes and was not eligible for exemption. Also contested was qualifying ownership. The building of the new facility was financed by Hillcrest and leased to the Medical Center to save the hospital from incurring debt so that ownership and use were clearly divided between the parent corporation and its subsidiary.

Guided by *Claremont Health Systems, Inc. v. Point Pleasant Bor.*, 16 N.J. Tax 604 (1997), this Tax Court held "Where the user of the property has only a leasehold interest, a hospital purposes exemption is unavailable." And the Tax Court in *Mega Care, Inc. v. Union Twp.*, 15 N.J. Tax 566 (1996) concluded that the requirement the property owner be organized for hospital purposes and the requirement the exemption claimant be the property owner could not be satisfied unless the affiliate owning the property was restricted by its own incorporation certificate to activities supporting and integrated with those of the hospital. In this case, Hillcrest's operations were not, by its own certificate of incorporation, restricted to support Hackensack Medical Center. Therefore, property owned by Hillcrest was not exempt although it was used by the hospital. Both the 1992 partial and added assessment and the 1993 full year assessment were affirmed.

Motor Fuels Tax

Assessment - Inadequate Records
Harvey Nobel & Beaverbrook Motors, Inc. v. Director, New Jersey Division of Motor Vehicles, decided June 19, 2000; Tax Court No. 323-1999. Harvey Noble is the shareholder of Beaverbrook Motors, Inc. (hereinafter BMI), a corporation that operates tow trucks and small tractor-trailers, as well as the sole proprietor of Beaverbrook Motors, a Gulf service station (hereinafter service station).

BMI vehicles obtained the majority of their fuel from the service station on an as-needed basis. At the time of each BMI fuel purchase, the service station processed a "house account" slip at the full-posted price. The house account slips were totaled and then debited to BMI's account on a daily basis through an inter-company accounting. Periodically, a settlement was made for the purchased fuel.

Pursuant to a Division of Motor Vehicle (DMV) audit, BMI was assessed tax due to DMV's denial of BMI's claimed fuel tax credit for motor fuel tax paid to New Jersey where fuel was used out-of-State because BMI's records were insufficient to establish fuel purchases in New Jersey. In accordance with the regulations, DMV used a 4 mpg factor to estimate fuel use because BMI did not maintain adequate records. After a conference, DMV's Final Determination upheld the audit assessment providing that "bartering is not an acceptable means of proving that fuel was purchased and the tax was paid."

The Court first addressed whether DMV was precluded from claiming insufficiency of records as the basis for the assessment and limited to defending the assessment on the language contained in the Final Determination. The Court observed that case law did not require that an administrative agency state all possible grounds and theories to support their assessment nor did it preclude it from developing defensive theories to justify the assessment as long as it acts within the statutory period and meets due process requirements. The Court found that BMI was aware that DMV considered its records insufficient, that there was no claim of surprise or prejudice, and that case law indicated that alternative arguments would not prejudice the taxpayer because the Tax Court reviews proceedings *de novo*.

Addressing the issue of whether or not the house account slips constituted sufficient proof of New Jersey fuel purchases, the Court found that BMI's records were not in accordance with the Regulation's requirements because the records did not state all the required information. The Court refused to tailor an equitable remedy by relaxing the requirements of the Regulation. Furthermore, the Court stated that "[w]hether or not the taxpayer followed acceptable accounting procedures is also irrelevant since its use of acceptable accounting procedures is not the standard for compliance with the New Jersey Motor Fuels Use Tax Act."

Finally, the Court upheld DMV's estimated fuel use of 4 mpg based on the standard announced in the International Fuel Tax Agreement Audit Manual to calculate the use tax liability in the absence of adequate or complete records. Therefore, the Court upheld DMV's Final Determination.

Sales and Use Tax

Adequacy of Books and Records
Seventeen Thirty Corp. v. Director, Division of Taxation, decided October 4, 1999; Tax Court No. 3648-97. In a prior hearing, April 16, 1999, the Court held that the three-dollar minimum purchase requirement to enter plaintiff's video booth area constituted an admission charge subject to sales tax. This opinion concerns the total amount of plaintiff's sales tax liability. Previously, the Court ruled that the burden of proving that the total token sales were not subject to sales tax was upon plaintiff, the person required to collect tax.

The Division assessed sales tax on all of plaintiff's token sales. Plaintiff argued that the Division's methodology was incorrect because (1) tokens were used to purchase merchandise where sales tax was collected, (2) the $3 minimum token purchase requirement was only in effect for ten months of 1993, and (3) only three or four people paid the minimum purchase requirement as good customers or regular patrons were not required to buy a minimum token purchase. Plaintiff produced only verbal testimony regarding the aforementioned allegations. The Court found that the testimony was nothing more than "bare assertions" and cited the *Ridolfi v. Director, Division of Taxation*, 1 N.J. Tax 198, 202-203 (Tax Ct. 1980) ruling that naked assertions are insufficient to rebut the Director's presumption of correctness. The Court quoted N.J.S.A. 54:32B-19, which sets forth the consequences of failing to maintain adequate books and records. Essentially, the statute permits the Director to determine the amount of tax due from any available information. Therefore, the Court upheld the Director's sales and use tax assessment on all plaintiff's token sales.

Fees for Exterminator's Reinspection
Williams Termite & Pest Control, Inc. v. Director, Division of Taxation, decided October 8, 1999; Tax Court; No. 003650-1997. Plaintiff is in the business of exterminating termites and other pests. Plaintiff provided both inspection and treatment services during the period at issue. The initial contract provided for an inspection, treatment and a future annual reinspection and treatment fee. After performing the initial services, plaintiff sent annual renewal notices to its customers offering reinspection and further treatment services, if necessary, for a $109 fee. Sales tax was charged on the initial contract price but not on the $109 renewal. At issue was whether the renewal was subject to tax where the initial service included treatment.

The Court cited articles published in the January/February 1976, March/April 1979, and July/August 1981 *New Jersey State Tax News* that made it clear that the Division had pronounced that "when there is an obligation to retreat, and there has been a previous contract requiring treatment, the new charge, the warranty charge, the reinspection charge, the annual charge, whatever it is called, is subject to tax." The Court found the Director's interpretation logical acknowledging that there was no question of taxability where all the annual reinspection fees were charged with the initial contract.

The Court ruled that a "reinspection fee, which includes the right to a treatment, if necessary, which follows a treatment under the contract terms in this case, is subject to sales tax." The Court did not rule on the taxability of a reinspection fee following only an inspection as those facts were not before the Court.

Maintenance and Servicing
L&L Oil Service, Inc. v. Director, Division of Taxation, decided January 21, 2000; Tax Court No. 6341-97. Plaintiff was in the business of pumping waste oil, sludge, and anti-freeze from storage tanks, ranging in size from 276 to 1,000,000 gallons, located on both commercial and residential properties into its trucks. The waste materials were then transported to its facility where the waste was either purified or processed for resale. Plaintiff's invoices usually charged a lump sum price for pumping and removal without charging sales tax. It should be noted that a few invoices included a separate transportation fee and a few charged sales tax. At issue in this case was whether or not plaintiff's services constituted maintenance or servicing which is subject to sales tax.

The Court held that plaintiff's waste removal services constituted maintenance or servicing because the removal allowed the tanks to be used again for their intended purpose of collecting waste. Therefore, the Court ruled that its customers' payments were taxable under the Sales and Use Tax Act.

The Court rejected plaintiff's alternative theories of nontaxability. First, the Court ruled that fees charged for removal did not constitute the acquisition of raw materials for an integrated waste removal, processing and resale operation because customers paid plaintiff only for the services of pumping and removal. Second, the Court ruled that simply because plaintiff did not have a license from the Department of Environmental Protection to perform maintenance or repair involving hazardous waste contained in storage tanks, even if such license was required, that did not make the services nontaxable because the DEP Tank Statutes and the Sales and Use Tax Act are not *in pari materia*. Third, the Court rejected plaintiff's argument that the services were exempt because they involved the removal and transportation of wastes and would be exempt under the transportation exemption. Fourth, the Court ruled that plaintiff's services did not constitute a capital improvement because there was no evidence that the value of the real property increased as a result of its services and plaintiff's own expert testified that the services did not improve the storage tank's condition. Finally, the Court refused to waive interest on the basis that plaintiff relied on erroneous advice from the Division. The Court found that none of plaintiff's inquiry letters fully and accurately described the nature of plaintiff's operations and neither the Division's correspondence nor the *New Jersey State Tax News* even suggested that plaintiff's actual maintenance and service operations were exempt from sales tax.

Sale for Resale/Closing Agreements
Adamar of New Jersey t/a Tropicana Casino and Resort v. Director, Division of Taxation, 17 N.J. Tax 327 (Tax 1998), aff'd in part and rev'd in part; Appellate Division; No. A-3974-97T3 (February 25, 2000). Plaintiff is a casino that applied for and was judicially denied a sales tax refund concerning tax paid on purchases of both alcoholic and nonalcoholic beverages provided to patrons on a complimentary basis. As to the complimentary alcoholic beverages, the Appellate Division cited its decision in *GNOC Corp.* (see below) as controlling. With respect to the complimentary nonalcoholic carbonated beverages, this Court cited its opinion in *Boardwalk Regency* (see below) as controlling.

Sale for Resale/Closing Agreements
GNOC Corp. t/a The Grand v. Director, Division of Taxation, 17 N.J. Tax 327 (Tax 1998), aff'd. (App. Div. 2000); No. A-4045-97T3. In 1980, alcoholic beverages were statutorily exempted from sales and use tax under N.J.S.A. 54:32B-8.34. In 1981, the Director entered into a closing agreement, in accordance with N.J.S.A. 54:53-1, with the casino industry that was subsequently amended in 1986 and 1988. The 1981 agreement provided, *inter alia*, as follows:

> No sales tax will be imposed in the provision of complimentary meals. However, a use tax pursuant to N.J.S.A. 54:32B-6 will be imposed upon the "cost" of a meal. For these purposes, the cost of the meal would be deemed to be 25% of the amount these meals are sold to the public by the casino. However, no sales and/or use tax will be imposed upon the provision of complimentary liquor.

The Court quoted the Appellate Division's interpretation of the amendments to the original agreement as follows: "[T]he 1986 and 1988 agreements abandoned an effort to collect taxes for fully complimentary meals in exchange for an agreement by the plaintiff to collect and pay the sales tax for partially 'comped' meals and [nonalcoholic] beverages." *Boardwalk Regency Corporation t/a Caesars Atlantic City Hotel & Casino v. Director, Division of Taxation,* 17 N.J. Tax 331 (Tax 1998), rev'd 18 N.J. Tax 328, 333 (App. Div. 1999). All the agreements contained a statutorily required clause stating that specific subsequent legislation would supersede the agreement and that the Division and the casinos would no longer be bound.

Effective July 1, 1990, the legislature repealed the N.J.S.A. 54:32B-8.34 sales and use tax exemption for retail sales of alcoholic beverages. Thereafter, the Division assessed use tax on plaintiff's tax-exempt, sale for resale purchases of alcoholic beverages that were provided as complimentary drinks to its patrons for the period January 1, 1991, to September 30, 1994.

Addressing the issue of whether the purchase of alcoholic beverages constituted a nontaxable sale for resale, the Appellate Division upheld the Tax Court's ruling that there was no resale of alcoholic beverages furnished to casino patrons on a complimentary basis because there was "legally insufficient consideration."

Concerning the issue of whether the agreement bars the Director from taxing the complimentary alcoholic beverages, the Tax Court ruled that purchases of alcoholic beverages provided as complimentary drinks were subject to sales and use tax because the agreement only reiterated the then current law that alcoholic beverages were exempt from sales and use tax. The Appellate Division affirmed but disagreed with the Tax Court's reasoning. The Appellate Division held that subsequent legislation repealing the alcohol exemption superseded the agreement.

Plaintiff's claim that specific legislation taxing "complimentary alcoholic beverages" was required to supersede the agreement was rejected by the Court. The Appellate Division ruled that the provision "[h]owever, no sales or use tax will be imposed upon the provision of complimentary liquor," was only inserted into the 1981 agreement to clarify the preceding sentence that alcoholic beverages would not be included in computing the 25% cost of a meal that was subject to sales/use tax. The Appellate Division reasoned that a meal could be interpreted to include a beverage and as alcoholic beverages were not then subject to sales/use tax they should be excluded from the tax computation on complimentary meals. Therefore, the Appellate Division ruled that specific legislation relating to "complimentary alcoholic beverages" was not required.

Sale for Resale/Closing Agreements
Boardwalk Regency Corporation t/a Caesars Atlantic City Hotel & Casino v. Director, Division of Taxation, 17 N.J. Tax 331 (Tax 1998), rev'd 18 N.J. Tax 328 (App. Div. 1999). The Division assessed use tax on plaintiff's purchases of nonalcoholic carbonated beverages purchased with an ST-3 sales tax resale certificate that were provided as complimentary drinks to its patrons and provided to its own employees during working hours for the period January 1, 1991, to September 30, 1994.

During the periods at issue, nonalcoholic beverages were subject to sales and use tax. In 1981, the Director entered into a closing agreement in accordance with N.J.S.A. 54:53-1 with the casino industry that was subsequently amended in 1986 and 1988. The 1981 agreement provided, *inter alia*, as follows:

> No sales tax will be imposed in the provision of complimentary meals. However, a use tax pursuant to N.J.S.A. 54:32B-6 will be imposed upon the "cost" of a meal. For these purposes, the cost of the meal would be deemed to be 25% of the amount these meals are sold to the public by the casino. However, no sales and/or use tax will be imposed upon the provision of complimentary liquor.

The 1986 agreement provided, *inter alia*, that there would be no imposition of sales or use tax on complimentary meals and defined complimentary meal to mean noncash payments for food or beverage. The Appellate Division found that "[t]he 1986 and 1988 agreements abandoned an effort to collect taxes for fully complimentary meals in exchange for an agreement by the plaintiff to collect and pay the sales tax for partially 'comped' meals and beverages."

Addressing the issue of whether the purchase of nonalcoholic beverages constituted a nontaxable sale for resale, the Appellate Division upheld the Tax Court's ruling that there was no resale of nonalcoholic beverages that were furnished to casino patrons and employees on a complimentary basis because there was "legally insufficient consideration."

On the issue of whether the agreement bars the Director from taxing the purchase of the nonalcoholic carbonated beverages at issue, the Tax Court held that the provision was invalid as the Director cannot compromise tax liabilities under N.J.S.A. 54:53-1 where they are not limited in time and are disadvantageous to the State. On appeal, the Appellate Division reversed and ruled that the Director's agreements must be deemed presumptively valid as he has broad discretion to settle tax disputes. The Court remanded the case for a factual finding of the scope of the settlement agreements as to whether the agreements addressed and included nonalcoholic beverages served complimentary with a meal and/or without a meal to plaintiff's customers and served complimentary to plaintiff's employees.

Assessment - Inadequate Books & Records

TAS Lakewood, Inc. v. Director, Division of Taxation, decided April 18, 2000; Tax Court No. 003058-98. The Division's audit of plaintiff's 1993 and 1994 New Jersey sales tax returns revealed discrepancies between gross receipts reported on plaintiff's filed tax returns. Plaintiff's 1993 New Jersey sales tax return reported gross sales of $47,115 whereas its 1993 Federal corporation income tax return reported gross sales of $1,040,157. Plaintiff's 1993 New York general business corporate franchise tax return reported gross sales of $1,040,157; and that $207,491, or 19.95%, of these sales were attributable to New York. As to 1994, plaintiff's New Jersey sales tax return reported gross sales of $62,533 whereas its Federal corporation income tax return reported gross sales of $882,748.

The Division was unable to audit plaintiff's books and records because plaintiff disposed of them when it ceased business operations. In determining the $76,061.76 plus interest sales tax assessment, the Division recalculated the amount of New Jersey gross taxable sales for 1993 and 1994 by accepting US gross sales as reported on the corporation income tax returns as total sales and reducing that amount by the approximate 19.95 percentage of 1993 sales attributable to New York.

Plaintiff challenged the Division's assessment claiming that (1) sales were not subject to sales tax, (2) sales attributable to New Jersey are lower than the Division determined, (3) it is entitled to sales tax credit for tax it paid to suppliers on goods and services subsequently resold, and (4) sales consummated with exempt entities amounted to approximately 5% of its sales. Substantiation for plaintiff's allegations rested on the testimony of its vice president and 50% shareholder who acknowledged that there was no documentary proof to support his testimony.

The Court ruled that where the plaintiff fails to maintain records the Division is permitted to determine the amount of tax from available information, including external indices, and that this determination carries a presumption of correctness. The Court held that not only did plaintiff fail to rebut the presumption but that it had reviewed the audit figures based upon plaintiff's tax returns and found it to be reasonable and justified by law.